

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Brian Kirby,
Plaintiff,

v.
Ryan Thornell, et al.,
Defendant.

No. CV-23-02619-PHX-SHD (MTM)
REPORT AND RECOMMENDATION

TO THE HONORABLE SHARAD H. DESAI, UNITED STATES DISTRICT
JUDGE:

I. Summary of Conclusion

This matter is before the Court on its own review. Plaintiff failed to effect service on Defendant Mocha and the service deadline has expired. Accordingly, the Court will recommend that Plaintiff's claims against Defendant Mocha be dismissed without prejudice under Rules 4(m) and 41(b) of the Federal Rules of Civil Procedure.

II. Background

On December 15, 2023, Plaintiff Brian Kirby filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983. (Doc. 1.) On July 17, 2024, the Court screened the Complaint and ordered Defendants Pelton, Mocha, Masters, Pennington-Stallcup, Ragsdale, Beard, Astrada, Nanson, Rossetto, Davis, Young, McClellan, Godlevsky, and Fielder to answer

1 the Complaint.¹ (Doc. 28.) The Court also stated, if Plaintiff does not either obtain a waiver
 2 of service of the summons or complete service of the Summons and Complaint on a
 3 Defendant within 90 days of the filing of the Complaint or within 60 days of the filing of
 4 the screening order, whichever is later, the action may be dismissed as to each Defendant
 5 not served. (*Id.*)

6 The record reflecting that Defendant Mocha was never properly or timely served,
 7 the Court issued an Order requiring Plaintiff to show cause why Defendant Mocha should
 8 not be dismissed under Fed. R. Civ. P. 4(m) for failure to complete service. (Doc. 92.)
 9 Plaintiff has not responded to the Court's Order or otherwise effected service on Defendant
 10 Mocha, and the time for doing so has expired.

11 **III. Discussion**

12 **a. Rule 4(m)**

13 As an initial matter, Plaintiff has failed to timely serve Defendant Mocha under Rule
 14 4(m) of the Federal Rules of Civil Procedure, which requires that service be completed
 15 within 90 days of the date the complaint was filed.

16 If a defendant is not served within 90 days after the complaint is filed, the
 17 court—on motion or on its own after notice to the plaintiff—must dismiss
 18 the action without prejudice against that defendant or order that service be
 19 made within a specified time. But if the plaintiff shows good cause for the
 failure, the court must extend the time for service for an appropriate period.

20 Fed. R. Civ. P. 4(m).

21 Good cause to avoid dismissal may be demonstrated by establishing, at
 22 minimum, excusable neglect. *See Boudette v. Barnette*, 923 F.2d 754, 756
 23 (9th Cir. 1991). In addition to excusable neglect, a plaintiff may be required
 24 to show the following factors to bring the excuse to the level of good cause:
 25 “(a) the party to be served personally received actual notice of the lawsuit;
 (b) the defendant would suffer no prejudice; and (c) plaintiff would be
 severely prejudiced if his complaint were dismissed.” *Id.*

26 *Lemoge v. United States*, 587 F.3d 1188, 1198 (9th Cir. 2009).

27
 28 ¹ The Court also gave Plaintiff 120 days from the filing date of its Order in which to
 discover, by subpoena or otherwise, the actual identity of Defendant Jane Doe, and to file
 a “notice of substitution” providing that Defendant’s actual name. (Doc. 28.)

1 Here, Plaintiff has neither filed proof of service on Defendant Mocha nor shown
2 good cause why the action should not be dismissed against her. Accordingly, the Court will
3 recommend the action be dismissed without prejudice as to Defendant Mocha for failure
4 to serve under Rule 4(m) of the Federal Rules of Civil Procedure.

5 **b. Rule 41(b)**

6 Plaintiff's action may also be dismissed under Rule 41(b) of the Federal Rules of
7 Civil Procedure, for failure to comply with this Court's Orders. Rule 41(b) of the Federal
8 Rules of Civil Procedure provides "[i]f the plaintiff fails to comply with these rules or any
9 order of court, a defendant may move to dismiss the action or any claim against it." In *Link*
10 *v. Wabash Railroad Co.*, 370 U.S. 626, 629-31 (1962), the Supreme Court recognized that
11 a federal district court has the inherent power to dismiss a case *sua sponte* for failure to
12 prosecute. Moreover, in appropriate circumstances, the Court may dismiss a complaint for
13 failure to prosecute even without notice or hearing. *See id.* at 633.

14 In determining whether Plaintiff's failure to prosecute warrants dismissal of the
15 case, the Court must weigh the following five factors: "(1) the public's interest in
16 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk
17 of prejudice to the defendants; (4) the public policy favoring disposition of cases on their
18 merits; and (5) the availability of less drastic sanctions." *Carey v. King*, 856 F.2d 1439,
19 1440 (9th Cir. 1988) (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)).
20 "The first two of these factors favor the imposition of sanctions in most cases, while the
21 fourth factor cuts against a default or dismissal sanction. Thus the key factors are prejudice
22 and availability of lesser sanctions." *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir.
23 1990).

24 Here, the first, second, and third factors favor dismissal of this case as to Defendant
25 Mocha. Plaintiff's failure to effect service on Defendant Mocha as directed, prevents the
26 case from proceeding against her in the foreseeable future. The fourth factor, as always,
27 weighs against dismissal. The fifth factor requires the Court to consider whether a less
28

1 drastic alternative is available. The Court has already ordered Plaintiff to show cause why
 2 this matter should not be dismissed and Plaintiff has not responded.

3 The Court finds that only one less drastic sanction is realistically available. Rule
 4 41(b) provides that a dismissal for failure to prosecute operates as an adjudication upon the
 5 merits “[u]nless the dismissal order states otherwise.” In the instant case, the Court finds
 6 that a dismissal with prejudice would be unnecessarily harsh. Therefore, the Court will
 7 recommend dismissal of this action without prejudice as to Defendant Mocha pursuant to
 8 Rule 41(b) of the Federal Rules of Civil Procedure.


9 Accordingly,

10 **IT IS RECOMMENDED** that Plaintiff’s Complaint (Doc. 1) be **dismissed**
 11 **without prejudice** as to Defendant Mocha under Fed. R. Civ. P. 4(m) and Fed. R. Civ. P.
 12 41(b).

13 This recommendation is not an order that is immediately appealable to the Ninth
 14 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
 15 Appellate Procedure, should not be filed until entry of the district court’s judgment. The
 16 parties shall have 14 days from the date of service of a copy of this Report and
 17 Recommendation within which to file specific written objections with the Court. *See* 28
 18 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(b) and 72. Thereafter, the parties have 14 days
 19 within which to file a response to the objections.

20 Failure to timely file objections to the Magistrate Judge’s Report and
 21 Recommendation may result in the acceptance of the Report and Recommendation by the
 22 district court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114,
 23 1121 (9th Cir. 2003). Failure to timely file objections to any factual determinations of the
 24 Magistrate Judge will be considered a waiver of a party’s right to appellate review of the
 25 findings of fact in an order of judgment entered pursuant to the Magistrate Judge’s Report
 26 and Recommendation. *See* Fed. R. Civ. P. 72.

27 Dated this 22nd day of September, 2025.

28

 Honorable Michael T. Morrissey
 United States Magistrate Judge